Supreme Court, U. S.
FILED
JUL 14 1951
CHARLES ELMORE CROPLEY
CLERK

No. 188

Supreme Court of the United States

OCTOBER TERM—1951

GEORGE GILLETTE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

VINE H. SMITH,
Attorney for Petitioner.

FRANK E. HOOK,
OTHO S. BOWLING,
Of Counsel.

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POINT FIRST: *Petitioner was indicted for transporting in interstate commerce forged securities from the Southern District of New York. The proof showed that the securities were transported, not from the Southern District of New York but from the Eastern District of New York. Nevertheless, the Court of Appeals affirmed the conviction on the eighth count, on the theory that the jury must have found that accessorial acts were committed in the Southern District of New York. Nothing was said about that in the indictment. Nothing was said about that in the court's instructions. The court charged the jury that the problem was to find whether there was transportation "from the State of New York" to*

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another state. Whether the jury did or did not find beyond a reasonable doubt that accessorial acts were committed in the Southern District of New York, no one can say. The finding of the Court of Appeals that accessorial acts were so committed was an original finding, beyond the power of that court, and apparently made in conflict with an applicable decision of this Court. 15

POINT SECOND: *The indictment charges transportation from the Southern District of New York. That transportation was not proved. The Court of Appeals upheld the conviction upon the theory that petitioner became an "accessory" in the Southern District of New York. But the indictment does not allege that petitioner became an "accessory" in the Southern District of New York. It charges actual transportation from the Southern District of New York to a district in another state.* 21

POINT THIRD: *Although the proof showed that the offense was committed outside the jurisdiction of the Court, the Court of Appeals held that petitioner was properly convicted, nevertheless, because there was proof of accessorial acts within the jurisdiction of the court. The Court of Appeals reasoned that since, at common law, an accessory is triable where accessorial acts are committed, since the statute makes him who aids or abets, counsels or advises, a prinicpal, this "does not supersede the common law of venue but provides an additional venue." The court overlooked the fact that there are not and never were accessories before the fact under federal*

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law, and hence when one who aids or abets was made a principal, there was no pre-existing rule of venue to broaden. Furthermore, the Court of Appeals ignored the Sixth Amendment to the Constitution which requires crimes to be prosecuted in the district "where the crime shall have been committed," not where it was counseled or advised. Also it must have overlooked so much of the Sixth Amendment as requires that one "be informed of the nature and cause of the accusation." 23

POINT FOURTH: *Over petitioner's objection a government witness was permitted to testify, that in petitioner's absence, "I was told by Joseph Di Palermo that if anything went wrong I had nothing to worry about in this case and that Gillette was backing the deal." The Court of Appeals excused this on the theory that the statement was "made to encourage Larigan, newly admitted to the conspiracy, to act as a check passer." There is no evidence that it was so made, or that Larigan needed any encouragement.* 26

AUTHORITIES

Constitution:

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Statutes:

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Revised Statutes, 5334 24

Revised Statutes, 5335 24

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Beauchamp v. United States, 154 Fed. (2d) 413 24

Billeci v. United States, 184 Fed. (2d) 394 18

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Dinger v. Unted States, 28 Fed. (2d) 548 18

Ex Parte Bain, 121 U. S. 1 21

Fiswick v. United States, 329 U. S. 211 27

Fosse v. United States, 44 Fed. (2d) 915 18

Haas v. Henkel, 216 U. S., 462 25

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United States v. Anderson, 328 U. S. 699 25
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United States v. Goodman, 129 Fed. (2d) 1009 28
Unted States v. Hudson, 7 Cranch (11 U. S.) 32 24
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United States v. Ramsay, 27 Fed. Cases #16115 24
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Van Riper v. United States, 13 Fed. (2d) 961 28

Wiborg v. United States, 163 U. S. 632 27

Text Books:

Bishop, New Criminal Law, §663 24

Supreme Court of the United States

OCTOBER TERM—1951

GEORGE GILLETTE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

This, the petition of George Gillette, a resident of the Borough of Brooklyn, City and State of New York, respectfully shows:

I.

This is a petition for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit, to review a judgment of that court affirming in part a judgment of conviction rendered against the petitioner under an indictment charging transporting, and conspiring to transport, in interstate commerce, certain forged checks.

II.

Jurisdiction

This court has jurisdiction because the petitioner is seeking a review of a judgment rendered by the United States Court of Appeals for the Second Circuit, and provision for the exercise of such jurisdiction is made by Fed-

eral Statutes and Rules (U. S. C. Title 28, Section 1254, Rule 37(b) of the Rules of Criminal Procedure and Rule 38 of the Rules of this court).

Basically, the jurisdiction of the Federal courts, and in particular of this Court, further appears from the nature of the questions presented. Those questions (see IV *post*) include the inquiry whether the Sixth Amendment to the Constitution of the United States permits the conviction of a defendant in the Southern District of New York under an indictment charging a crime in that district, when the evidence shows—as the Court of Appeals holds (830*)—that the offense was not committed in that district. The Court of Appeals, in deference to the Sixth Amendment, reversed the conviction as to one substantive count, but as to another, sustained the conviction on the ground that, as to the offense therein concerned, the defendant had been shown to have become "an accessory [before the fact] in Manhattan" in the Southern District, which, at common law, might have made him subject to prosecution there as such accessory (830-1).

This petition for certiorari is timely because the Court of Appeals denied this petitioner's application for rehearing in its final opinion and decision rendered on June 4, 1951 (855-7), and Mr. Justice Jackson of this Court, by order made within thirty days thereafter, to wit, June 18, 1951, extended the time for filing "to and including July 15, 1951." This petition is filed within the time as so extended.

The decision of the Court of Appeals has not been reported at the time of the writing of this petition. Both the original and final opinions of the Court of Appeals appear in the record (828-34, 855-7).

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* Numerals in parentheses in this petition and in the annexed brief refer to pages of the transcript of record, unless otherwise indicated.

III.

The Nature and History of the Case

A short but adequate statement of the character of this case and the questions involved may be found in petitioner's application for rehearing, the prosecution's answer, petitioner's reply thereto, and the final opinion of the Court of Appeals rendered on June 4, 1951, all of which are contained in the record (835-57).

For the purposes of this petition, the proceedings herein may be briefly outlined. The petitioner, George Gillette, with various others, was charged in an indictment filed in the Southern District of New York in nine substantive counts, with the crime of transporting, with unlawful and fraudulent intent, in interstate commerce, certain forged securities, to wit, American Express Travelers Cheques (18-24), in violation of U. S. C. Title 18, Section 2314, and in a further count, the Tenth, with conspiring so to do, in violation of U. S. C. Title 18, Section 371 (24-8). Each of the substantive counts charged the defendants with transporting such spurious cheques to and from "the City, County, State and Southern District of New York."

The cause came on for trial in the Southern District of New York before Hon. J. Waties Waring, District Judge, sitting by assignment in that district, and a jury.

At the close of the prosecution's case, the trial court, on motion of defendant, George Gillette, directed an acquittal on the first seven counts of the indictment, holding that there was no evidence tending to implicate him in any of the various instances of interstate transportation, alleged in those counts (617, 621, 623, 635-6). In reaching this conclusion, the trial court necessarily and expressly held unproved the prosecutor's assertions of Gillette's connection with the overall conspiracy and his assumption of the role of supervision of its operation (616, 617).

The court, however, held that there was evidence requiring submission to the jury of the question whether Gillette was a participant in the conspiracy (Tenth Count) and in the transportation of some of the spurious checks from New York to Chicago (Eighth Count) and from New York to Los Angeles (Ninth Count). The jury returned a verdict of guilty as to these three counts (787).

The court imposed sentence of imprisonment for ten years under the eighth count; ten years under the ninth count, these terms to run consecutively, and five years under the tenth count, the conspiracy count, to run concurrently. It further imposed fines of $7,500. on each of the substantive counts and $5,000. on the conspiracy count. The aggregate period of imprisonment thus imposed was twenty years and the total of the fines was $20,000. (818).

At the trial, counsel for the defendant, Gillette, the petitioner herein, besides moving for acquittal on the general ground that the proof was insufficient, brought to the Court's attention, by motion, the specific objection that there was no proof of interstate transportation originating in or passing through the Southern District of New York, and no evidence of the existence of any purpose or plan for such interstate transportation until after the spurious checks had been taken to the Eastern District of New York. As to the eighth, ninth and tenth counts, the court denied all petitioner's motions for acquittal or dismissal. [The Court of Appeals, it is to be noted, agrees with petitioner as to the effect of the evidence upon this point and holds that there is no proof of interstate transportation from, through or in the Southern District of New York—830.]

Trial counsel for the petitioner, thereupon, assuming that the question as to where the interstate transportation originated would be left to the jury as one of fact, discussed this question in his summation (700-1). The court, however, did not leave this issue to the jury, even

as a question of fact, but charged that the question was whether the transportation was *"from the State of New York to other states"* (754). Petitioner's attorney called this portion of the charge to the attention of the trial judge, excepted to his failure to submit to the jury the question as to whether the interstate transportation was from the Southern District of New York, as alleged in the indictment, and requested a charge submitting such issue (774), but the trial judge, adhering consistently to the theory of his main charge that the question was whether the transportation was from the State of New York, refused this request (774).

The defendant's counsel also repeatedly objected to the sufficiency of the prosecution's proof under any of the counts of the indictment and further objected to certain rulings of the court upon evidence, in particular to the admission of hearsay statements made by members of the conspiracy in the defendant's absence (204-5, 598).

Petitioner appealed to the United States Court of Appeals for the Second Circuit. That court affirmed the conviction of the substantive offense charged in the eighth count (transportation from New York to Chicago), reversed the conviction under the ninth count (transportation from New York to Los Angeles) and affirmed the conviction under the tenth count for conspiracy (828 *et seq.*). This decision was rendered on April 11, 1951.

By petition filed pursuant to the rules of the Court of Appeals, the petitioner, on April 26, 1951, applied for re-hearing. Thereafter by direction of the Court of Appeals, the prosecution filed an answer to the second ground stated in the petition for re-hearing (848-54). The petitioner filed a reply to the prosecution's answer, which reply, of course, appears in the record (852-5). The Court of Appeals in its final opinion and decision dated June 4, 1951, adhered to its original view that, although there

was neither evidence nor—under the trial court's charge—a finding by the jury of interstate transportation from the Southern District of New York, as alleged in the indictment, nor even a finding of any "accessorial" act of petitioner in that District, nevertheless, there was evidence upon which the defendant Gillette, at common law, could have been found to have become an "accessory" in that district and that, although that question of accessorial status had not been submitted to the jury, which omission the court said was error (831), nevertheless, the jury must be presumed to have found the facts essential to its determination (831-2).

The defendant is now imprisoned pursuant to the judgments aforesaid.

IV.

Questions Presented

1. As to the eighth count, a substantive count charging transportation of the forged checks from the Southern District of New York to Chicago, Illinois.

(a) It appearing that no part of such transportation was from or in that district and that the averment of the indictment respecting the same was unproved, and under the charge not even found by the jury, can the conviction and venue be justified, notwithstanding the Sixth Amendment, on the ground that petitioner became, in the Southern District, an accessory to the interstate transportation in and from a different district?

(b) Can the conviction be justified, notwithstanding that the accessorial offense is not alleged in the indictment, that no such crime as being an accessory before the fact exists under the statutes of the United States and, of course, that no penalty for such offense has been authorized by any such statute?

(c) No grand jury having accused the petitioner of being an accessory—even if the offense of being such accessory before the fact existed—does the affirmance based on that offense violate the provision of the Fifth Amendment to the Constitution which prohibits trial or conviction of infamous crime except upon presentment or indictment duly returned by a grand jury?

(d) There being no submission to the jury of the question whether petitioner became in the Southern District of New York an accessory or abettor, can the Court of Appeals, itself, determine that in fact (and beyond a reasonable doubt) he did so?

(e) Apart from constitutional questions, can the failure to prove interstate transportation from or in the Southern District of New York and the proof instead of such transportation from and in a different district properly be treated as immaterial?

(f) Can the conviction obtained under the unproved accusation that petitioner was a principal be justified on the ground first presented in the appellate court, that he was an accessory?

2. As to all three counts.

Was the admission of hearsay statements made in petitioner's absence, and over his objection, erroneous and prejudicial?

V.

Reasons for Allowance of Writ

1. The Court of Appeals, in affirming the conviction under the eighth count, although holding that such count was not proved and not even properly submitted to the jury, decided the questions above specified in 1(a) to (c) (*ante*) erroneously, and in violation of petitioner's rights under the Fifth and the Sixth Amendments. (See Points Second and Third of the Annexed Brief.)

2. The Court of Appeals in such affirmance decided the questions stated (*ante*) in 1(d) to (f) in a manner which departs from the accepted and usual course of judicial proceedings, and, moreover, is in plain conflict with applicable decisions of this Court, in particular—

Bollenbach v. *United States,* 326 U. S. 607, 610.

This decision was brought to the attention of the Court of Appeals (845). The Court of Appeals in its final opinion (857) undertakes to distinguish it (856-7). The distinction urged is that in the case at bar the jury "could not have convicted Gillette on count 8 unless they found that he aided and abetted the transportation from New York to Chicago and the only evidence of his participation in the scheme prior to the arrival of the checks in Chicago was Larigan's testimony as to what occurred at the meeting in Manhattan on August 19th. Hence, the jury must have believed this testimony, unless they disregarded the instructions, which we may not assume."

This statement is erroneous both in its assumption as to the law and in its reading of the record. The fallacy in the Court's reasoning is in the assumption indicated by the words "and the only evidence of his participation," etc.

Whether or not the account of the meeting in the restaurant in Manhattan should be regarded as the only evidence of the petitioner's participation in the substantive offense is not controlling. The point is that the jury was instructed that it must consider all the evidence relating to the petitioner's association with any of the conspirators anywhere, in New York, in Chicago or in Los Angeles, for the purpose of determining his guilt or innocence under each of the counts (763).

The jury was not told that it had to find or determine specifically what acts of abetting or participation the petitioner had committed or where he had committed them but, if on the whole record, the jury was satisfied that he had become a participant in the plan to transport from the State of New York to another state before the checks were actually transported, he was guilty. Actually the only thing said to have happened at the restaurant in Manhattan tending to inculpate petitioner was the statement elicited from Larigan, with some leading on direct examination, that petitioner said he wanted to go out to supervise (203-4). This statement, however, he did not include when he was again asked repeatedly on cross examination to state the whole conversation (265-6).

Now, even if the jury were not satisfied beyond a reasonable doubt that petitioner at the restaurant in Manhattan actually said what Larigan quoted him as saying, they could still, under the instructions, have found from the evidence of his being in Chicago and Los Angeles when the active participants in the illicit enterprise were there, that he had had, prior to the interstate transportation, become an abettor of that offense. That this is what the court intended the jury to understand is further clear from his similar instruction regarding the defendant Borda, who was charged with being a participant in the transportation from New York to Los Angeles and in the conspiracy.

There was no evidence that Borda had ever been in the Southern District or, indeed, in the State of New York at all. The evidence of his participation was the timeliness of his arrival in Los Angeles for the purpose of acting as a check passer. Nevertheless, the court charged as to him that the jury could infer from Borda's association with the conspiracy in Los Angeles that he had been a party to the earlier interstate transportation (762, fol. 2285).

Precisely, the same freedom was accorded the jury in the court's instruction as to the petitioner. The assumption of the Appellate Court that the jury must have found that the petitioner became a participant and an "accessory" in the Southern District of New York is not in accord with the record and is in substance an independent finding of fact by the Appellate Court. (See Point First of the Annexed Brief.)

3. The Court erroneously admitted evidence of hearsay statements made by members of the conspiracy and participants in the substantive offenses in the petitioner's absence which were prejudicial to him and not justified by any of the exceptions authorizing the admission of such statements when made in the execution of the conspiracy or when they are evidential of the scope thereof.

In particular, the Court received in evidence and refused to strike out the statement testified by Larigan to have been made to him by Joseph Di Palermo that "Gillette was backing the deal" (205). In this connection it is to be observed that although the Court repeatedly ruled that this evidence was not to be considered as evidence of petitioner's participation in the conspiracy or in the substantive offenses charged, the prosecutor, nevertheless, in his summation quoted—and, indeed, misquoted (732) this bit of hearsay testimony as probative of petitioner's guilt.

The Court's rulings in admitting such statements are further discussed in the annexed brief, Point Fourth.

VI.

For the reasons aforesaid petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to the end that its errors aforesaid, if such they be, may be corrected.

Dated, July 13, 1951.

Respectfully submitted,

VINE H. SMITH,
Attorney for Petitioner.

I certify that, in my opinion, the foregoing petition is well founded and that it is not interposed for the purpose of delay.

VINE H. SMITH,
Attorney for Petitioner.

viction on count Ninth (transportation from the Southern District of New York to California) but affirmed on the Eighth count (transportation from the Southern District of New York to Illinois), and on the Tenth count (conspiracy) (833).

On petition for rehearing the Court of Appeals, after requesting and receiving a further brief from the prosecutor, wrote a further opinion adhering to its original holding (855-858).

The forged securities alleged to have been transported were forged American Express Travelers Cheques. There was no evidence and no claim that petitioner had anything to do with their printing. There was no evidence that petitioner had the least connection with or knowledge of the existence of the cheques or of their intended transportation until August 19, 1949. According to the government's witness Larigan, who was one of the check passers, there was a meeting on that evening at a restaurant in the Southern District of New York at which petitioner was present, and there was discussion as to what cities should be chosen for the cashing of the checks (199-204). Two days later Larigan and two others took the plane at La Guardia Field, in the Eastern District of New York, and flew to Chicago, taking the checks with them (210-211).

There is evidence that two days after the checks got to Chicago petitioner was there, and when the check passers went from Chicago to Los Angeles, petitioner also went.

The Court of Appeals reversed the conviction on the Ninth count for the reason that there was no proof of any purpose to transport to California until after the parties had arrived in Chicago (1011), but refused to reverse the conviction on the Eighth count notwithstanding the fact that the checks were not transported from or through the Southern District of New York.

POINTS

FIRST

Petitioner was indicted for transporting in interstate commerce forged securities from the Southern District of New York. The proof showed that the securities were transported, not from the Southern District of New York but from the Eastern District of New York. Nevertheless, the Court of Appeals affirmed the conviction on the eighth count on the theory that the jury must have found that accessorial acts were committed in the Southern District of New York. Nothing was said about that in the indictment. Nothing was said about that in the court's instructions. The court charged the jury that the problem was to find whether there was transportation "from the State of New York" to another state. Whether the jury did or did not find beyond a reasonable doubt that accessorial acts were committed in the Southern District of New York, no one can say. The finding of the Court of Appeals that accessorial acts were so committed was an original finding, beyond the power of that court, and apparently made in conflict with an applicable decision of this Court.

The counterfeit checks were printed in the Southern District of New York and delivered by the printer to a man named Faucella in July, 1949 (93, 116). The indictment fixes the date as "on or about July 25, 1949" (27). What happened to them after that, we do not know. The only proof is that about a month later there was, for the first time, talk about taking the checks to other states to cash them, they were already in Brooklyn in the Eastern District of New York, and it was from La Guardia Field in the latter district that the checks went by air to Chicago

(210-211). The Court of Appeals held that the evidence showed that transportation was from and through other districts than that in which the indictment was found, that "there was no evidence that they [the checks] were within the Southern District of New York when their interstate transportation to Chicago was planned at the meeting on August 19" (830).

This failure to prove the crime charged was brought to the trial court's attention by motion (663-664) and again by exception to the charge and request for an instruction that the indictment alleged interstate transportation within the Southern District of New York.

When these matters were brought to the attention of the Court of Appeals that court said that petitioner's argument "fails to recognize that Gillette became an accessory in Manhattan [Southern District] on August 19th to the later transportation to Chicago because at the meeting in the restaurant he counseled, aided and abetted it." At common law, said the court, petitioner would have been an accessory and would be triable in the district where the accessorial acts took place, but since 18 U. S. C. §2 makes him who counsels, aids or abets a principal the common law is not "superseded" but the government is given "an additional venue" (830-831).

The court then had to face the problem that the trial judge not only had submitted no such proposition to the jury but had told them that "The charge here is that the checks * * * were carried from the State of New York to other States," ignoring entirely that the jury's burden was to find an offense within the *district* (22). The court had to concede that this was error since "under the Sixth Amendment proof of venue is an indispensable part of the prosecution's case" (831). But, reasoned the court, "the instruction could not have affected the verdict and was a non-prejudicial error" because it was "highly improbable" that the jury "might not have believed Larigan's

testimony as to the part Gillette took in the meeting of August 19th" (832). The witness Larigan had testified that at this meeting Gillette stated that he "would meet us in Chicago," that "he, Gillette, wanted to go to supervise this thing" (203-204).

When counsel, by petition for rehearing, pointed out that an appellate court was making an original finding of fact not made by the jury, contrary to the admonition of this Court in *Bollenbach* v. *United States,* 326 U. S. 607, the Court wrote another opinion in which it said that further study of the charge convinced the court that the jury "necessarily found that he [petitioner] abetted in Manhattan the interstate transportation to Chicago" (1386), since the trial judge charged that petitioner could not be guilty of transportation unless he aided and abetted, inasmuch as he did not carry the checks himself, and "the only evidence of his participation in the scheme prior to the arrival of the checks in Chicago was Larigan's testimony as to what occurred at the meeting in Manhattan on August 19th. Hence the jury must have believed this testimony" (857).

Putting aside, for the moment, the questions whether the Sixth Amendment permits one to be prosecuted not where the crime is committed, but where it is counseled or advised, and whether one may be convicted on an indictment charging transportation from one district by proof of transportation from another, which we discuss in Points Second and Third (*post*), did the Court of Appeals make an original finding of fact? This Court has pointed out in *Bollenbach* v. *United States,* 326 U. S. 607, 614-615, that

> "* * * it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according

to the procedure and standards appropriate for criminal trials in the federal courts."

* * * * *

"In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be" (326 U. S. at 614-615).

Petitioner submits the court erred in assuming that the jury "necessarily found" that petitioner performed "accessorial acts" in the Southern District of New York for these reasons.

(a) Nowhere was the jury charged, as it should have been, that petitioner could not be guilty unless it was found beyond a reasonable doubt that (1) he did attend a meeting in the Southern District of New York and (2) what he did and said there constituted aiding or abetting, counseling or advising transportation from another district. It was the duty of the jury not only to find the facts beyond reasonable doubt but to appraise them beyond reasonable doubt. If the New York meeting were conceded it would still be a jury problem to appraise its effect.

Dinger v. *United States,* 28 Fed. (2d) 548, 550, 551;
Fosse v. *United States,* 44 Fed. (2d) 915;
United States v. *Gollin,* 166 Fed. (2d) 123, *cert. den.,* 333 U. S. 875;
Billeci v. *United States,* 184 Fed. (2d) 394, 401.

What a jury would have done if properly instructed, nobody knows, particularly since there is no evidence of such a meeting except in the testimony of the witness Larigan, who had been a criminal since childhood (192-193, 233-244), testimony made only after considerable leading (203-204) and which was forgotten on cross (265).

(b) There is plenty of evidence that petitioner was in Chicago when the checks were being cashed there. Indeed, petitioner's own witnesses said so, although they explained petitioner's presence by legitimate business affairs (638-640). Because the jury considered the evidence of petitioner's presence and association in Chicago sufficient to connect him with the scheme to transport, it does not follow that they believed Larigan sufficiently to convict had they been instructed on the court's accessorial theory. To show that one is connected with a scheme does not require proof of acts before the scheme was effected. Connection may sometimes be inferred from what is done afterward. Indeed, the trial court expressly left it to the jury to determine from the whole record, not just from the testimony of Larigan, whether petitioner aided or abetted. The court charged:

> "Gillette is charged in three counts. There is testimony that he was present in New York and the matter was talked about, the plan. The Government says that he was in Chicago and that he was in Los Angeles. * * * You have heard all the testimony as to that, as to how he registered at the hotel, as to his meeting with these people, as to his goings, as to his comings, as to his associations, and those are facts which you, ladies and gentlemen, are to pass upon" (763).

(c) That the jury was permitted, indeed required to decide on the whole record is further demonstrated by what

the trial judge charged as to the co-defendant Borda. The ninth count of the indictment, which was reversed, charged transportation from the Southern District of New York to Los Angeles. Borda cashed some checks in Los Angeles. There was no evidence, not a bit, that Borda ever spoke a word in the Southern District of New York. The only proof is that he arrived in Los Angeles very soon after the checks got there, having come from Philadelphia, and that after he got to Los Angeles he started to cash checks. Nevertheless, the court submitted to the jury the question whether Borda was guilty of the substantive offense of transportation. The court said:

> "• • • If there were an understanding, an agreement that Borda was to travel to Los Angeles by some independent means from the person who actually conveyed the checks and he knew the checks were going from here to Los Angeles—that is necessary—and then that they met in Los Angeles and he had knowledge that he was handling the New York counterfeit checks, then he would be equally guilty of the substantive offense of aiding or abetting in the transportation of those checks" (762).

Could the jury have conceived that there was one law for Borda and another for petitioner? It is unthinkable. Since the jury was told that it might infer from Borda's conduct in Los Angeles that an understanding preceded actual transportation and if there were such an understanding Borda was just as guilty as though he had transported them himself, it must have understood that it was privileged to draw the same inference from petitioner's conduct in Chicago.

To assume that the jury "necessarily" believed a character such as Larigan is pure guesswork.

SECOND

The indictment charges transportation from the Southern District of New York. That transportation was not proved. The Court of Appeals upheld the conviction upon the theory that petitioner became an "accessory" in the Southern District of New York. But the indictment does not allege that petitioner became an "accessory" in the Southern District of New York. It charges actual transportation from the Southern District of New York to a district in another state.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and proper trial by an impartial jury of the State and district wherein the crime shall have been committed * * *"

This indictment charges a crime, *viz.*, transportation from the *Southern* District of New York. The proof showed transportation from the *Eastern* District. How could petitioner be tried in a district other than the one "wherein the crime shall have been committed"?

Because of the Sixth Amendment questions of venue "raise deep issues of public policy."

United States v. *Johnson*, 323 U. S. 273, 276.

The Court of Appeals endeavored to avoid the fact that the indictment charges an offense in one district whereas the proof shows an offense in a different district on the ground that although the indictment erroneously alleged that transportation took place "from the Southern District of New York petitioner had counseled and advised transportation from the latter district." We shall consider the court's accessory theory in the next point. It is suffi-

cient to say now that the Grand Jury did not charge petitioner with accessorial acts in the Southern District of New York; it charged him with actual interstate transportation from that district, and the proof showed there was no such transportation by him or anyone else.

If the indictment had charged, according to the fact, that transportation was between districts outside the jurisdiction of the court, it would have had to be dismissed because:

> "It must be conceded that under the Sixth Amendment to the Constitution the accused could not be tried in one district on an indictment showing that the offense was not committed in that district" (*Salinger* v. *Loisel,* 265 U. S. 224, 232).

It makes no difference, therefore, whether the Court of Appeals was correct or in error in believing that the jury necessarily found the facts in accordance with the verdict. The Fifth Amendment commands that defendant should not be required to answer the charge of transporting from the Eastern District of New York until he had first been accused by a Grand Jury of that very offense. He was never so accused. To permit the indictment to be amended *sub silentio,* as it was here, put petitioner to trial on an accusation which was *not* the accusation of the Grand Jury and which ousted the court of jurisdiction to proceed further.

Ex parte Bain, 121 U. S. 1.

THIRD

"Although the proof showed that the offense was committed outside the jurisdiction of the Court, the Court of Appeals held that petitioner was properly convicted, nevertheless, because there was proof of accessorial acts within the jurisdiction of the court. The Court of Appeals reasoned that since, at common law, an accessory is triable where accessorial acts are committed, since the statute makes him who aids or abets, counsels or advises, a principal, this "does not supersede the common law of venue but provides an additional venue" (831). The court overlooked the fact that there are not and never were accessories before the fact under federal law, and hence when one who aids or abets was made a principal, there was no pre-existing rule of venue to broaden. Furthermore, the Court of Appeals ignored the Sixth Amendment to the Constitution which requires crimes to be prosecuted in the district "where the crime shall have been committed," not where it was counseled or advised. Also it must have overlooked so much of the Sixth Amendment as requires that one "be informed of the nature and cause of the accusation."

The Court of Appeals endeavored to avoid the fact that petitioner was charged with transporting from the wrong district by finding that he counseled and advised in the district named. The court reached this conclusion by saying that one who counsels or advises was an accessory before the fact at common law, and under common law rules could be prosecuted in the venue where the accessorial acts are performed. Therefore, reasoned the court, when Congress enacted that he who counsels or advises is a principal

(18 U. S. C. §2) it provided "an additional venue" (831). The court overlooked two things.

First. There is not, never was, any federal common law. All federal criminal law is purely statutory.

United States v. *Hudson,* 7 Cranch (11 U. S.) 32.

The present statute (18 U. S. C. §2) was originally enacted as §332 of the Federal Penal Code of 1910. Before that, although there were a few statutes making him who aids or abets, counsels or advises, equally guilty with him who actually does the forbidden act (*e.g.,* R. S. 5325, 5334, 5335) there never was a statute defining the offense of an "accessory before the fact." Since the offense of being a principal and the offense of being an accessory are different (1 Bishop New Crim. Law §663) there never was a time when an accessory before the fact could be prosecuted as such in a federal court.

Beauchamp v. *United States,* 154 Fed. (2d) 413, 415-416; cert. den. 329 U. S. 723; rehearing den. 329 U. S. 826;
United States v. *Ramsay,* 27 Fed. Cas. #16115.

Therefore the Court of Appeals erred in saying that the statute making the abettor a principal "broadens * * * the venue jurisdiction inherited from English law" (831) because no venue jurisdiction was inherited from English law, and what never existed cannot be "broadened."

Second. The crime charged in the indictment is interstate *transportation.* 18 U. S. C. §2 does not say that it is a crime to aid or abet, counsel or advise. It says that he who does so is a principal, that is, he is guilty of the substantive offense, not of the different offense of aiding and abetting. In other words, if petitioner is guilty of anything it is not

of aiding and abetting but of the transportation itself, and that transportation took place in a district without the jurisdiction of the court.

Under the Sixth Amendment crimes must be prosecuted in the district in which the *crime* was committed; in this case, in a district from which or through which transportation took place. It has always been the law that under the Sixth Amendment venue does not depend on the place where the defendant resides or happens to have been at some time or other, but on the "district or districts within which the offense was committed."

> *United States* v. *Anderson,* 328 U. S. 699, 704-705; *Haas* v. *Henkel,* 216 U. S. 462.

This "offense," whoever committed it, was committed beyond the jurisdiction of the court.

But even if one may be prosecuted in a district where he only counsels or advises and where no substantive act takes place, surely he cannot be convicted on an indictment which charges an act different from the one proved. The indictment charges transportation within the jurisdiction of the court. The contrary was proved. We do deny that one who merely aids or abets may be indicted for having performed the act. That is not the point. The act charged (transportation from the Southern District) was not proved. Something quite different was proved. Neither petitioner nor anyone else committed the offense of interstate transportation within the jurisdiction of the court. If petitioner was to be prosecuted in a different district than that wherein transportation took place on the theory that he gave some advice there, he should have been so apprised. The Sixth Amendment requires that a defendant "be informed of the nature and cause of the accusation." This indictment did not inform. It deceived.

FOURTH

Over petitioner's objection a government witness was permitted to testify that, in petitioner's absence, "I was told by Joseph Di Palermo that if anything went wrong I had nothing to worry about in this case and that Gillette was backing the deal" (204-205). The Court of Appeals excused this on the theory that the statement was "made to encourage Larigan, newly admitted to the conspiracy, to act as a check passer" (1832). There is no evidence that it was so made, or that Larigan needed any encouragement.

The government's witness Larigan was testifying on direct. He testified that there was a restaurant meeting on the night of August 19, 1949. He said that petitioner left the meeting. Then this occurred:

> "Q. After Gillette and Turiano had left, did you have any conversation with Joseph Di Palermo about Gillette and Gillette's part in this deal that had been discussed? A. I did, and was told by Joseph Di-Palermo that Gillette—
>
> "Mr. Corbin: I object.
>
> "Mr. Cohn: Does not the testimony of this witness clearly furnish the basis from which the jury can find that Joseph Di Palermo was co-conspirator of Gillette from the statements made by him?
>
> "The Court: I think you are right. I will allow it.
>
> "Q. *Will you tell us, according to his Honor's ruling, what conversation you had with Joseph Di Palermo, what you asked him and what he told you?* A. *I was told by Joseph Di Palermo that if anything went*

wrong I had nothing to worry about in this case and that Gillette was backing the deal.

"Mr. Smith: I move to strike that out. It has nothing to do with the scope of the conspiracy; it is brought in here as hearsay. I respectfully object to it as hearsay" (204-205).

The statement of one conspirator is sometimes admissible against another, not as an exception to the hearsay rule, but on the theory that the statement is an *act* in the execution of the conspiracy and evidential of its scope.

Admissible declarations are considered in the nature of overt acts (*Fiswick* v. *United States,* 329 U. S. 211, 216-217; *Pinkerton* v. *United States,* 328 U. S. 640, 646-647), or, as older cases put it, as part of the *res gestae* (*Wiborg* v. *United States,* 163 U. S. 632, 657), or, as Chief Judge Learned Hand of the court below stated in another case (*United States* v. *Renda,* 56 Fed. [2d] 601, 602),

"The declarations of one party to a concerted mutual venture are admitted against the rest on the notion that they are acts in its execution."

The conspiracy charged here was to transport forged checks in interstate commerce. The gossip between Larigan and Di Palermo was not spoken in the course of moving checks, did not tend to move checks, and was not spoken for that purpose.

The statement that "Gillette was backing the deal" was a pure narrative conclusion. It was nothing more than Di Palermo's supposition, drawn from something which somebody (not necessarily petitioner) had said or done; or it may have been pure imagination. Therefore, the result was that there was permitted against petitioner a statement by someone not in court, not made in peti-

tioner's presence, a statement not of anything said or done by petitioner which could be contradicted, but a conclusion drawn from sources unknown and which could not be inquired into.

Narrative statements by a co-conspirator are never admissible on the theory that they are acts in the execution of the conspiracy.

> *United States* v. *Goodman,* 129 Fed. (2d) 1009, 1013;
> *Van Riper* v. *United States,* 13 Fed. (2d) 961, 967;
> *People* v. *Davis,* 56 N. Y. 95, 103.

The Court of Appeals excused the admission of this testimony on the ground that it "was properly admissible as a statement made to encourage Larigan, newly admitted to the conspiracy, to act as a check passer" (832). There are two answers to this. First, it was not a part of the conspiracy that Larigan should be encouraged to do anything. Second, the evidence indicates no such purpose. Larigan had been handling forged checks since childhood (192-193, 233-244). He needed no encouragement. A substantial time before this alleged declaration of Di Palermo was made Larigan had said, as he testified:

> "I was willing to participate in any check-cashing scheme.
>
> * * * * *
>
> "Mr. Turiano offered me 15% of all checks that I would cash * * * I agreed to Mr. Turiano's proposition" (202).

This Court has recently pointed out the abuses of the conspiracy count by federal prosecutors (*Krulewitch* v. *United States,* 336 U. S. 440). Nevertheless, federal prose-

cutors persist. A federal indictment against more than one defendant which does not have a conspiracy count tacked at the end is a rarity. These prosecutors know that "A co-defendant in a conspiracy trial occupies an uneasy seat." (*Krulewitch* v. *United States, supra,* p. 454.) The very purpose of the conspiracy count is to permit proof of all sorts of acts and declarations which have no connection with the defendant himself, but are those of another alleged "conspirator."

These admonitions go unheeded. There is no remedy except to hold rules of evidence strictly within their present limits.

Dated, July 13, 1951.

Respectfully submitted,

VINE H. SMITH,
Attorney for Petitioner.

FRANK E. HOOK,
OTHO S. BOWLING,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 188

GEORGE GILLETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals on appeal (R. 828-833) and denying rehearing (R. 855-857) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1951 (R. 833-834) and a petition for rehearing was denied on June 4, 1951 (R. 858). By order dated June 18, 1951, Mr. Justice Jackson extended the time for filing the petition for a writ

of certiorari to July 15, 1951 (R. 859), and the petition was filed on July 14, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the conviction of petitioner, who was shown to be an aider and abettor and co-conspirator, must be reversed because the indictment charged interstate transportation of counterfeit checks from the Southern District of New York and the proof shows that the direct interstate transportation began in the Eastern District of New York.

2. Whether the trial court erred in permitting a co-conspirator to testify that another co-conspirator told him, in petitioner's absence, that if anything went wrong, there was nothing to worry about because petitioner "was backing the deal," and, if so, whether the testimony was prejudicial where the jury was instructed that it was not to be used to prove the conspiracy but only as proof of "facts occurring in furtherance of the conspiracy."

STATUTES INVOLVED

18 U.S.C. 2:

> (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.
>
> (b) Whoever causes an act to be done,

which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

18 U.S.C. 2314:

* * * * *

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any * * * counterfeited securities, knowing the same to have been * * * counterfeited; * * *

* * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York on counts eight, nine and ten of an indictment (R. 787), which charged him, respectively, with transporting from the Southern District of New York to Chicago in interstate commerce counterfeited American Express travelers checks; with transporting from the Southern District of New York to Los Angeles in interstate commerce counterfeited American Express travelers checks; and with conspiring to transport the counterfeited checks in interstate commerce (R. 23-25). He was sentenced to consecutive terms of ten years' imprisonment and a $7,500 fine on each of the substantive counts, and to five years' imprisonment, to run concurrently with the other prison terms, and a $5,000 fine on the conspiracy count (R. 818).

The evidence adduced by the Government may be summarized as follows:

In March 1949, George Faucella solicited Nicholas Frasca and Philip Schwartz, New York City lithographers, to print counterfeited American Express travelers checks, which they agreed to do for $15,000 (R. 83-85, 98, 112). At about the same time, Alexander Patrick King, at the request of Alfred Turiano, secured some genuine American Express travelers checks for use in making the counterfeited ones. King was to organize and manage a group of check passers for 30 percent of the profits. (R. 348-355.)

From the genuine checks, the lithographers made counterfeit plates with which they printed in the Southern District of New York counterfeited checks of the face value of $420,000. They also printed and turned over to Faucella several hundred counterfeited draft classification cards and drivers licenses to be used by check passers for identification purposes. Frasca and Schwartz delivered the counterfeited checks to Faucella in the latter part of July at their shop in New York City in the Southern District. (R. 85-92, 99-101, 112-114.)

Prior to the delivery of the checks, about the middle of June, Turiano and Faucella informed King that there was "a new combination" in the picture and that they could give him only ten percent. He was later promised 20 percent and per-

mitted to engage one man to work with him. He hired Patrick Joseph Finnegan as a check passer. (R. 355-357, 427-428.)

Edward Robert Larigan testified, *inter alia,* that early in August 1949, he was asked by Joseph Di Palmero and his brother, Peter, to participate in the counterfeit check-passing scheme; that as a result of his talks with the Di Palermos, he met them on the evening of August 19, 1949, at Di Polo's Restaurant in Manhattan in the Southern District, where he was escorted to a table at which petitioner and Turiano were seated; that Thomas Polo joined them; that Larigan was asked whether he had any knowledge of travelers checks and the method of cashing them, to which he replied that he had never handled them but was willing to try; that Turiano offered him 15 percent of all the checks which he cashed, to which he agreed; that, after discussing several cities, it was agreed to start the check-passing operations in Chicago; that petitioner expressed the opinion that Havana was not a good point of distribution; that Joseph Di Palermo told petitioner that he "did not have to enter the picture whatsoever," to which petitioner replied that he wanted to go along "to supervise this thing" and that, since he could not go along with the others because he had a payroll to meet in Brooklyn, he would follow later; that when the meeting was over Larigan went outside with Joseph Di Palermo; that shortly thereafter petitioner and Turiano left

together in a car; that Di Palermo than told Larigan that "if anything went wrong [Larigan] had nothing to worry about in this case and that Gillette was backing the deal" (R. 199-205, 264-266).

Larigan further testified that Saturday night, August 20, Joseph Di Palermo told him that Di Palermo and Polo had to go to Brooklyn to pick up the checks (R. 210).

The three of them, Larigan, Joseph Di Palermo and Polo took a plane for Chicago on Sunday morning, August 21, carrying the checks with them in Di Palermo's suitcase (R. 211-212). Upon their arrival in Chicago, they registered in different hotels under assumed names (R. 212).

Early Monday morning, August 22, King and Finnegan, pursuant to instructions from Turiano, arrived in Chicago and registered at a hotel under false names (R. 358, 429). Turiano arrived that afternoon and registered at the Palmer House under an assumed name (R. 213, 496).

Larigan testified that on Monday afternoon, shortly before Turiano arrived, he received a telephone call from petitioner in New York. Petitioner wanted to know if everything was all right. He said that he would arrive in Chicago late that night or early Tuesday morning. He also obtained from Larigan the name of the hotel, and the room number, at which Joseph Di Palermo was staying. (R. 216, 292-293.)

The members of the party spent Monday eve-

ning, August 22, and Tuesday, extensively preparing and planning for the check-passing operations, under the general direction of Turiano (R. 215-220, 359-365, 429-430).

On Monday evening Polo, who had the checks, failed to show up and there was general concern over his absence. Larigan testified that Turiano remarked, in connection with Polo's absence, that everything had to be ready when petitioner, who was due the following day, arrived. (R. 215.) Larigan further testified that on Tuesday afternoon, while he was in Turiano's room in the Palmer House, petitioner and Joseph Di Palermo came in; that they decided that the checks would be passed the following day (Turiano having obtained them from Polo, who supposedly had been ill); that petitioner and Di Palermo left together after remaining about five minutes, and that Turiano told him that petitioner was staying in the Palmer House two floors above his own room under the assumed name of Martini (R. 220-221). The hotel records showed that a room on that floor was registered to Frank Martini during August 22-24 (R. 498).

Tuesday night King and Finnegan, pursuant to Turiano's instructions, cashed two checks (R. 365-366, 433). Larigan testified that he signed some of the counterfeit checks in Turiano's room that night while petitioner, Turiano and Di Palermo were present and that Di Palermo told him, in petition-

er's presence, that he and petitioner had watched King and Finnegan cash a traveler's check at the air office (R. 224).

Larigan also testified that on Wednesday morning he took checks of the face value of $50,000, which he had signed, up to petitioner's room, where he found petitioner, Di Palermo and Polo; that petitioner shook hands with him and said "he did not have to tell [Larigan] what to do," and that in petitioner's presence Larigan gave Di Palermo half the checks (R. 226, 277). Because of Polo's illness, Larigan was to team up with Joseph Di Palermo in the check-passing operations. The two of them left petitioner's room with the checks and drove out to the north side to begin passing them. But by this time Larigan had made up his mind to abandon the operation because of his small percentage and Polo's illness which he believed was feigned. (R. 226, 278-279, 286.) Accordingly, upon arriving at the first bank, Larigan took two books of the counterfeit checks and, while Joseph Di Palermo remained outside with the car which had been rented, walked in one door of the bank and out another without making any attempt to cash the checks (R. 227).

In the meantime King and Finnegan had been conducting successful check-cashing operations among the banks in the business district (R. 370). As a result of Larigan's disappearance, Chicago was deemed to have outlived its usefulness, and

the party, including petitioner, hurriedly departed for Los Angeles under assumed names (R. 371-376, 435-436, 520-529). There Borda joined them and further check-passing operations were conducted (R. 379-381, 439-445).

On appeal, the Court of Appeals held "that the jury was amply justified in finding that [petitioner] became a member of the conspiracy" (R. 830). With respect to the substantive count of transporting the counterfeits from the Southern District to Chicago (count 8), the court found that, although there was "no evidence that they were within the Southern District when their interstate transportation to Chicago was planned at the meeting on August 19th" and therefore the prosecution only proved a transportation from Brooklyn, where Joseph Di Palermo got the counterfeits before boarding the plane, to Chicago, this variance between the allegations and proof was not fatal. The court ruled that petitioner could be tried in the Southern District because he counselled, aided and abetted the transportation at the August 19 meeting in that district (R. 830-831). Although holding that the trial court properly charged that the substantive crime was transporting the checks "from the State of New York to other states" and adequately instructed on aiding and abetting, the Court of Appeals said that the trial court erred in not telling the jury that it had to find some act of aiding and abetting in the Southern District, necessary to establish venue.

But it held that this error was non-prejudicial for, since the "only direct testimony linking Gillette with the transportation from New York to Chicago came from Larigan who testified as to Gillette's conduct at the meeting on August 19th, to his long distance telephone call from New York, and to his presence and conduct in Chicago," it was "highly improbable" that "the jury believed what Larigan said of Gillette's actions in Chicago" and did not believe "Larigan's testimony as to the part Gillette took in the meeting of August 19th." (R. 831-832.)

The court accordingly affirmed the convictions on counts eight and ten. But it reversed the conviction on count nine, transportation to Los Angeles, on the ground of improper venue. For "[s]o far as appears the plan to move on to Los Angeles was not conceived until Larigan's defection in Chicago." Consequently, "[n]o accessorial acts with respect to transportation of any of the checks to Los Angeles were committed by Gillette in the Southern District." (R. 831.)

On rehearing, the Court of Appeals held that, instead of it being "highly improbable that the jury did not believe Larigan's testimony as to the part Gillette took in the meeting at the restaurant in Manhattan on August 19th," "the jury necessarily found that he abetted in Manhattan the interstate transportation to Chicago" (R. 856). For under the "instructions the jury could not have

convicted Gillette on count 8 unless they found that he aided and abetted the transportation from New York to Chicago and the only evidence of his participation in the scheme prior to the arrival of the checks in Chicago was Larigan's testimony as to what occurred at the meeting in Manhattan on August 19th" (R. 857).

ARGUMENT

1. This Court has settled that a variance in proof from the allegations of the indictment is non-prejudicial unless it " 'affect[s] the substantial rights' of the accused." *Berger* v. *United States,* 295 U.S. 78, 82.[1] In the course of its opinion in the *Berger* case, the Court explained (295 U.S. at 82) that

> The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.

[1] See recent cases holding variances between allegations and proof non-prejudicial: *United States* v. *Rosenblum,* 176 F. 2d 321, 324 (C.A. 7), certiorari denied, 338 U.S. 893; *United States* v. *Fried,* 149 F. 2d 1011 (C.A. 2), certiorari denied, 326 U.S. 756; *United States* v. *Cohen,* 145 F. 2d 82, 89 (C.A. 2), certiorari denied, 323 U.S. 799; *Cromer* v. *United States,* 142 F. 2d 697 (C.A.D.C.), certiorari denied, 322 U.S. 760; *Harris* v. *United States,* 140 F. 2d 567 (C.A. 4).

Petitioner does not maintain that he was misled in preparing his defense or that he was surprised by the evidence offered against him, as he could not. The proof conformed with the indictment as to the counterfeited checks transported and the time of their transportation. The only variance was that the counterfeits directly began their interstate trip to Chicago in the Eastern rather than the Southern District of New York. But the checks were made in Manhattan and were previously transported from there to Brooklyn. Petitioner and others also planned the transportation to Chicago in Manhattan. It is therefore evident that petitioner was fully aware that the offense with which he was charged was the very one of which he was convicted, and that he was not surprised by the evidence offered against him.

Nor does petitioner contend that the conviction places him in danger of second jeopardy for the same offense. Because of the similarity between the allegations and proof, and the fact that the counterfeits were previously transported from Manhattan to Brooklyn, he is not in danger of being convicted again for the transportation to Chicago. He has not shown that the variance affected his substantial rights. The variance and the trial court's instructions in connection therewith are significant only with respect to the question of venue—whether petitioner could be tried in the Southern District.

2. In that connection, petitioner's prime complaint (Pet. 8-10, 15-25) is that while the jury is not shown to have so found, the court below found as a fact that petitioner committed accessorial acts in the Southern District of New York. The short answer to that charge is that the record makes it quite clear that the jury did find that fact.

This appears from the opinions below and it is unnecessary here to repeat the analysis there made. Moreover, the matter is put beyond doubt by the instructions given by the trial court to the jury, at the request of petitioner's counsel, with respect to the conspiracy count. The trial court instructed that (R. 769):

> * * * The only direct evidence connecting Gillette with the alleged conspiracy is that he sat in on the meeting in the testimony of the witness Larigan. There is other testimony, however, as to his being in Chicago and being in Los Angeles, and the jury may consider those facts in connection with the testimony of the witness Larigan, and if those help them in determining that Larigan was or was not telling the truth, they may use those bits of testimony.

This instruction plainly meant that the jury must, in order to convict petitioner on the conspiracy count, believe Larigan's testimony concerning the August 19 meeting, and that the other evidence could only be used to test Larigan's credibility.

The jury's conviction on count ten was, therefore, a finding that Larigan's testimony concerning the August 19 meeting was true.

It follows that this case does not fall within the rule of *Bollenback* v. *United States,* 326 U. S. 607, relied on by petitioner (Pet. 8, 17-18). There is here no attempt to substitute a judicial appraisal of evidence for a jury finding. For, as has been shown, the jury did find the crucial fact— that petitioner aided and abetted the interstate transportation in the Southern District of New York.

3. Given such a finding, there is no question that petitioner's conviction, to the extent affirmed by the court below, must stand. Section 2 of Title 18 makes anyone who aids, abets or counsels the commission of an offense a principal. An accessory before the fact may, therefore, be charged with and convicted of the substantive offense; he need not be charged as an aider and abetter in order to convict him as such. *Nye & Nissen* v. *United States,* 336 U. S. 613, 618-620; *Von Patzoll* v. *United States,* 163 F. 2d 216 (C. A. 10), certiorari denied, 332 U. S. 809; *United States* v. *Knickerbocker Fur Coat Company,* 66 F. 2d 388, 390 (C. A. 2), certiorari denied *sub nom. Zuckerkandel* v. *United States,* 290 U. S. 673; *Cochran* v. *United States,* 41 F. 2d 193, 197 (C. A. 8); *Collins* v. *United States,* 20 F. 2d 574, 578 (C. A. 8). Accordingly, count eight of the indictment, in charging peti-

tioner with the substantive offense of interstate transportation of the counterfeits, also charged him with aiding and abetting the transportation. Indeed, count eight specifically referred to Section 2, as well as the section defining the substantive offense (R. 23).

The trial court, moreover, instructed the jury fully with respect to aiding and abetting (R. 754-755):

> In this case the charge of transportation, of course, will include causing to be transported or aiding or abetting. It is not necessary for a jury to find that A himself picked up a forged or counterfeit paper, check, or security and himself carried it in his hand from New York to Chicago or Los Angeles or some other place. But if he caused it to be done or aided or abetted in it, then he is equally as guilty as the person who carried the paper or the books or the suitcase in which these securities were carried from one state to another. In other words, ladies and gentlemen, one may act through another. I may scheme or devise to commit a crime and I may have you carry some of it out, and you and I are both guilty provided I actually knew and took part in causing you to take the securities from one state to another. I can act through you or you can act through me, and provided there was knowledge and intention to have the crime committed, we are guilty. The passive actor is as guilty as the active actor.

The jury verdict that followed upon these instructions is not to be set aside because the direct interstate transportation itself began in the Eastern District and not the Southern. For while Section 2 provides that one who "aids, abets, counsels, commands, induces or procures" the commission of an offense may be prosecuted and convicted as a principal, the Section actually establishes the common law offenses of accessories before and at the fact.[2] See *Eley* v. *United States,* 117 F. 2d 526, 528 (C. A. 6); *Cochran* v. *United States,* 41 F. 2d 193, 197-198 (C. A. 8); *Greenberg* v. *United States,* 297 Fed. 45, 48-49 (C. A. 8). Manifestly, an accessory is punished for his own acts of aiding, abetting or procuring the commission of the offense and not for the acts of another who committed the substantive offense.

At common law an accessory could only be tried where his accessorial acts took place. See opinion of court below and cases cited (R. 830-831). Since Section 2 makes an accessory punishable as a principal, he can now be tried where the substantive offense was committed, but that Section, as the court below held (R. 831), does not supersede the established common law venue, which unquestionably is contained in the general venue provision, Rule 18, F. R. Crim. P.

No reason appears why Section 2 should be con-

[2] The next section (18 U.S.C. 3) defines the offense of "accessory after the fact."

strued to eliminate the prosecution of an offender in the district where he actually aided or abetted a substantive offense committed elsewhere. This Court in *United States* v. *Johnson,* 323 U. S. 273, stressed the important policy considerations behind the requirement that an accused be tried where he committed his illegal acts. Those considerations support the conclusion that an aider and abettor may be tried where his accessorial acts were committed. Undoubtedly, Congress, in passing Section 2, deviated from that policy so that the prosecution could try all parties to the offense at once. But the enactment of this section for the convenience of the Government does not indicate an intention to eliminate a venue, should the Government choose to proceed there, which will better protect the interests of the defendant.

4. Petitioner contends that it was prejudicial error to permit Larigan to testify that, in petitioner's absence, he "was told by Joseph Di Palermo [a co-conspirator] that if anything went wrong [he] had nothing to worry about in this case and that Gillette was backing the deal" (Pet. 26-29). It is not disputed that declarations of a conspirator, made while the conspiracy is in progress for the purpose of furthering the conspiracy, are admissible against a co-conspirator. *United States* v. *Cohen,* 145 F. 2d 82, 89 (C.A. 2); *United States* v. *Dennis,* 183 F. 2d 201, 230 (C.A. 2), af-

firmed, 341 U. S. 494. Petitioner, however, maintains that the declaration in this case was not made in furtherance of the conspiracy but was only a narrative conclusion (Pet. 27). The facts of the case do not support his position; they show that the declaration was the very kind intended to be included in the rule.

Prior to the admission of the statement in evidence, there was, as the court below held (R. 832), ample evidence of the existence of the conspiracy and of petitioner's participation therein. Di Palermo made the statement immediately following the August 19 meeting at which Larigan had agreed to act as a check passer. The only purpose which we can see for making the statement was to encourage Larigan to remain in the conspiracy. Petitioner's contention that Larigan needed no encouragement (Pet. 28) is refuted by his later abandonment of the check-passing operations. Although Larigan had previously passed small personal checks, he had never had any experience with travelers checks, and his conduct shows that he was afraid that the wholesale check-passing operations would be unsuccessful. In any event, to establish the admissibility of declarations of coconspirators, it is not essential that they actually be needed to further the conspiracy so long as they are made for that purpose.

Petitioner's argument that the statement did not further the interstate transportation of the checks,

and, therefore, did not further the illegal conspiracy (Pet. 27) is without merit. For the conspirators would not have transported the checks to Chicago unless they were assured of check-passers to dispose of them there. For this reason, the statement, made to encourage Larigan to act as a check-passer in Chicago, was an act directly in furtherance of the conspiracy and as such admissible. *United States* v. *Chiarella,* 184 F. 2d 903 (C.A. 2).

In any event, the court instructed the jury that the statement was not to be used to prove the conspiracy, but was only pertinent, if the jury concluded "on other testimony that there was such a conspiracy," "as to the facts occurring in furtherance of the conspiracy" (R. 757). As pointed out in the *Dennis* case, *supra,* with respect to similar instructions, "these instructions in effect altogether withdrew the declarations from the jury" (183 F. 2d at 231). Consequently, the admission of the testimony, even if erroneous, was non-prejudicial.

CONCLUSION

There was no prejudicial error, the decision of the court below is correct and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

MURRY LEE RANDALL,
Attorney.

AUGUST 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 962649 108

Office-Supreme Court, U.S.
FILED
SEP 29 1951
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM—1951

No. 188

GEORGE GILLETTE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

VINE H. SMITH,
Attorney for Petitioner.

FRANK E. HOOK,
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—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

Report of the Case Below

Since the filing of the petition for certiorari, the opinion of the Court of Appeals herein has been reported (*United States* v. *Gillette,* 189 Fed. (2nd) 449; On re-hearing, id. page 453 *et seq.*).

The respondent's brief leaves unanswered the constitutional and statutory objections to the decision below.

Before referring to the four specific propositions urged by the Solicitor General in answer to the petition, it is important to note that he does not attempt to meet or counter the fundamental objections based on constitutional and statutory grounds which are set forth in the petition and supporting brief and upon which the Court of Appeals reversed the conviction under the ninth count of the indictment. The same basic reasons now urged for reversal, also, of the conviction under the 8th Count (transportation to Chicago) are as follows:

1. The indictment charges and the conviction adjudges the defendant guilty of the interstate transportation of

forged checks from and in the Southern District of New York. That averment and determination were indispensable, by reason of the Sixth Amendment, to authorize the trial in that district. This allegation in the indictment was unproved and was, indeed, disproved by the prosecution's own evidence which showed that when the interstate transportation was first planne dand initiated, the forged checks were already in the Eastern District of New York. This specific objection was pointed out to the trial court by motion (663), and again by exception and request to charge when the trial court had failed to submit the issue involved to the jury, even as one of fact (754, 774).

Because of this defect the Court of Appeals reversed the conviction under the 9th Count, charging transportation from the City, County, State and Southern District of New York to Los Angeles (830). The same defect likewise vitiated the conviction under the 8th Count, charging such interstate transportation from the Southern District of New York, and that Count should, likewise, have been reversed on the same ground, *viz.*, that the variance (besides being otherwise substantial) was rendered material and fatal by the Sixth Amendment. This violation of the express requirement of the Sixth Amendment was emphasized in our petition and brief herein (pp. 2, 6, 8, 21-25), but is ignored in the Solicitor General's brief.

2. The reasoning of the Court below and of the Solicitor General is that the defendant was properly convicted in the Southern District of New York of a crime not committed there, because he became in that district an accessory before the fact to an offense committed elsewhere. This reasoning likewise encounters fundamental objections to which the Solicitor General does not allude.

(a) There is not now and never was in the Federal courts any such crime as that of being an accessory be-

fore the fact. The Solicitor General does not attempt to meet or even refer to the judicial decisions and analysis of the statutes which negative the existence of any such offence (petition, pp. 7, 24). The Solicitor General's statement on page 14 of his brief—"an accessory before the fact," etc. is not supported by any authorities indicating that anyone can be prosecuted on the charge of being an accessory before the fact. Nor can one be convicted of abetting, as an offense distinct and apart from that of committing the crime charged as a principal.

(b) No Grand Jury has charged the defendant with the offense of being an accessory before the fact, even if that offense did exist. Under the Fifth Amendment such an accusation by the Grand Jury would be necessary, even if the felony of being such an accessory had been denounced as a crime by any Federal Statute.

(c) No Federal Statute having declared it a crime to be an accessory before the fact, there is, of course, no punishment provided for that fictional delict. The sentence imposed was based upon the statute referred to in the indictment providing punishment for the offense committed by a principal. The sentence was actually imposed by the trial court pursuant to its mistaken assumption that upon the evidence submitted, the jury could find that offense to have been proved as alleged. The Court of Appeals in affirming the judgment of conviction imposed under the 8th Count has necessarily, in effect, assumed to create a new offense to which it has affixed the same penalty actually provided for the offense charged in the indictment. The result is that the requirements both of the Fifth and Sixth Amendments have been ignored and violated. The Solicitor General has submitted nothing adequate, or even purporting, to meet these basic objections

to that affirmance, but has treated the matter solely as one of an immaterial variance in the pleading, unaffected by constitutional or statutory provisions.

We turn now to the Solicitor General's four specific propositions, all addressed to the question of variance.

The Government's First Proposition

At pages 11 and 12 of Respondent's brief, the learned Solicitor General argues that Petitioner could not possibly have been misled by an indictment which charged transportation from the Southern District of New York, because the thing transported happened to have been manufactured in the Southern District of New York some time before and because a witness testified that on one occasion there was a conversation in the Southern District of New York. We consider that a very large assumption. The allegation as to venue was essential to the jurisdiction of the court. Petitioner went into court to meet that allegation. The government claims now to have proved an offense within the jurisdiction of other courts. None of the cases cited at page 11 of Respondent's brief suggest that this is an immaterial matter. They deal only with immaterial errors in description of acts and things, not venue. The Solicitor General says (Respondent's Brief, p. 11) that petitioner did not (at the trial) claim to be "misled" or "surprised." The case was tried, summed up by both sides and submitted to the jury under the indictment as it stood with no suggestion that any alternative to the facts alleged in the indictment was relied upon by the prosecution. The government's proof of venue was admittedly insufficient. Our "surprise" was occasioned—and still continues—because of the appellate court's holding that the conviction under the eighth count

can be sustained on the theory that the prosecution, although it did not prove what the indictment indispensably alleged, did, nevertheless, prove something else just as bad.

The learned Solicitor General also argues (Respondent's brief, p. 12) that there can be no double jeopardy. He certainly cannot guarantee any such immunity—indeed he does not assume to do so. And it is by no means clear that he is right. One of the tests applied is "whether the facts alleged in the second indictment would, if given in evidence, have warranted a conviction on the first." (*United States* v. *One Buick Coach Automobile*, 34 Fed. (2d) 318, 321.) Here a second indictment, alleging transportation from the Eastern District, would not, if proved, warrant conviction on this indictment (*Salinger* v. *Loisel*, 265 U. S. 224, 232; Petitioner's main brief, p. 22).

But over and above these questions, we may repeat, is the Sixth Amendment. It is plain. It permits of no interpretation. It is not qualified by any clauses about surprise or double jeopardy. It means exactly what it says, namely, that the accused shall be tried by a jury "of the state and district wherein the *crime* shall have been committed." The crime charged here is interstate *transportation*, and no part of that transportation was in, from or through the Southern District of New York.

The Government's Second Proposition

Respondent's brief (p. 13) points out that the court charged that the only *direct* evidence "connecting Gillette with the alleged conspiracy" is the testimony of Larigan. But the court did not charge that direct evidence is required. The court charged the rule of circumstantial evidence fully (R. 751-752). Nevertheless it is argued,

"This instruction plainly meant that the jury must, in order to convict petitioner on the conspiracy court, believe Larigan's testimony concerning the August 19 meeting" (Respondent's brief, p. 13). That is not what the instruction says. It is not what it meant.

The jury was not told that Petitioner's conviction depended upon believing Larigan. It was told:

> "You have heard all the testimony as to that, as to how he registered at the hotels, as to his meeting with these people, as to his going, as to his comings, as to his associations and those are facts which you, ladies and gentlemen, are to pass upon" (R. 763).

In other words, the jury was permitted to convict on circumstantial proof as well as upon—or apart from—the testimony of Larigan.

That this is so is shown beyond any doubt by the court's further charge about "conspiracy" when the jury came in for additional instruction. This is what the court said:

> "The Court: I think I understand you, gentlemen, before you may find one guilty on a conspiracy count you must find that he was a member of the combination or conspiracy. Now you may find that either from direct testimony of his presence or statements by him or by other parties as to what he had done, *or you may deduce it from the facts.* If one meets with some of the co-defendants in another city and you have no evidence of his taking part in transporting or aiding or abetting in the transportation from New York to that other city, then you would not have substantial evidence of his being a party to the conspiracy. On the other hand, if from all the testimony that is presented to you, *you come to the*

conclusion from the preparations made or from what happened when they met in the other city that he had joined the conspiracy because he was prepared to go forward with the acts and that the acts that he did were done in pursuance of carrying out the terms of the conspiracy, then you may consider all of those facts in that connection. Does that help you?

"The Foreman: Very much, sir." (R. 777-778.) (Italics added.)

In other words, from what was done in Chicago and what was done in Los Angeles the jurors could find that there had been an understanding from the beginning. And it must be remembered that this was said concerning Borda as well as Petitioner, although Larigan had never seen Borda and there was no evidence that Borda had ever been in New York (Petitioner's main brief, p. 20). Likewise, the charge respecting this petitioner made no distinction between the eighth count and the ninth, yet as to the latter, there was admittedly no act or word in the Southern District of New York The Court could not have intended and the jury could not have understood that there was one law for Borda and another for Petitioner, or one probative requirement for the eighth count and a different one for the ninth. It is interesting to note that neither the Court of Appeals nor the Solicitor General made any effort to reconcile the supposed instruction as to Gillette with the plain instruction as to Borda,or to show how the same instructions meant one thing as applied to the eighth count and something different as applied to the ninth. Is it because it cannot be done?

The Solicitor General's reading of the court's charge (as applied to the eighth count only) likewise ignores the general principle which the trial court evidently had

in mind, *viz.*, that acts of abetting and conspiring may be shown by circumstances and need not be specifically pointed out, or fixed at any particular time or place.

> *Nye and Nissen* v. *U. S.*, 336 U. S. 613, 619;
> *Galatas* v. *U. S.*, 80 F. 2d 15, 23;
> *Davis* v. *U. S.*, 107 Fed. 753, 755.

In *Nye and Nissen* v. *U. S., supra,* this Court said (336 U. S. at 619):

> "There is no direct evidence tying Moncharsh to the six false invoices involved in the substantive counts. Yet there is circumstantial evidence wholly adequate to support the finding of the jury that Mancharsh aided and abetted in the commission of those offenses."

In *Galatas* v. *U. S., supra,* the Circuit Court of Appeals for the Eighth Circuit said (80 F. 2d at 23):

> "Overt acts of the parties may properly be considered with other evidence and attending circumstances in determining whether a conspiracy exists and where overt acts are of the character which are usually, if not necessarily, done pursuant to a previous scheme and plan, proof of the acts has a tendency to show such pre-existing conspiracy, so that when proven they may be considered as evidence of the conspiracy charged."

In *Davis* v. *U. S., supra,* the Circuit Court of Appeals for the Sixth Circuit said (107 Fed. at 755):

> "If the evidence shows a detail of facts and circumstances in which the alleged conspirators are involved,

separately or collectively, and which are clearly referable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, that is sufficient if it satisfies the jury of the conspiracy beyond a reasonable doubt."

The Government's Third Proposition

The learned Solicitor General, like the learned court below, confuses the case by mention of an "accessory before the fact." He overlooks the fact that there is not, never was, such a thing in Federal law (Petitioner's main brief, p. 24). True, one who aids or abets, counsels or advises may be prosecuted by charging that he committed the act itself (Respondent's brief, p. 14) because the statute (18 U. S. C. 2) makes him a principal in the commission of the crime. It does not help, it only confuses more to point out, as the learned Solicitor General does (Respondent's brief, p. 14), that a good indictment directly charges him who counsels and advises with the offense itself without saying that he counseled and advised it. This is because he who counsels and advises does commit, that is, if commission happens. It is not the counseling or advising which is a crime. There is no such offense in federal law as incitement to crime, as there was sometimes at common law (*Commonwealth* v. *Flagg*, 135 Mass. 545, 549). Apart from the conspiracy statute federal law punishes nothing except the act itself, and in this case the act was *interstate transportation*. So it may be substantially true, as the learned Solicitor General says, that when this indictment charged "the substantive offense of interstate transportation of the counterfeits, (it) also charged him with aiding and abetting the transportation" (Respondent's brief, p. 15); neverthe-

less, the "substantive offense" was committed elsewhere than within the jurisdiction of the court.

It only confuses further to say, as the court below did, and as the Solicitor General does (Respondent's brief, p. 16) that at common law an accessory before the fact could be punished where the accessorial facts took place. It is wrong, entirely wrong to say that 18 U. S. C. §2 "establishes the common law offense of accessories before * * * the fact" (Respondent's brief, p. 16). If that were so, then certainly this conviction would fall. The actual transporters were Larigan, Polo and Joseph DiPalermo. Not one of them was convicted, or if any were, it was after this trial. An accessory before the fact cannot be tried until after the principal has been convicted, because, as Blackstone says, "it might so happen that the accessory should be convicted one day and the principal acquitted the next, which would be absurd" (Book IV, p. 323). The government would get into all sorts of trouble if it pressed too far its argument based on the non-existent crime of accessory before the fact.

At page 17 of his brief the learned Solicitor General says there are "Policy considerations behind the requirement that an accused be tried where he committed his illegal acts." But the illegal *act*, as we have seen, was *interstate transportation.* Counselling and advising was not the crime denounced by statute or charged in the indictment. It has never been the law that one should be tried in the place where he stood at any particular time (Petitioner's main brief, p. 25). The Sixth Amendment commands that the trial shall be in the district within which the *crime* was committed. That this is so is well illustrated by *United States* v. *Lombardo,* 241 U. S. 74. Defendant had harbored an alien woman in a house of prostitution in the State of Washington. The statute required him to register that fact with the Commissioner General of Immigration. He did

not do so. His offense, therefore, was not an affirmative act, but an omission. Where was the *situs* of the offense? It was in the District of Columbia where the Commissioner had his office and where the paper should have been filed. Therefore, although it did not appear that defendant had ever been in the District of Columbia or had ever been without the State of Washington this court held that prosecution had to be in the District of Columbia. In accord is *Rumley* v. *McCarthy,* 250 U. S. 283, 289.

For these reasons we contend that this conviction cannot be sustained no matter what the court charged and no matter what the jury necessarily believed, because the Sixth Amendment was violated. Prosecution was in a different district than the one in which the crime was committed.

The Government's Fourth Proposition

The learned Solicitor General tries to excuse Larigan's quotation of DiPalermo's damaging narrative, conclusory statement that "Gillette was backing the deal" on the theory that its purpose "was to encourage Larigan to remain in the conspiracy" since Larigan was "afraid that the wholesale check-passing operations would be unsuccessful" (Respondent's brief, p. 18). This is the Solicitor General's reasoning, not Larigan's. Larigan deserted because he was dissatisfied with his percentage (R. 226). He had no fear of cashing forged checks. He had done that all his life. After he stole the two books entrusted to him he cashed those very checks all over the United States, from New York to California, from Minnesota to Florida (R. 285-289).

It is to be noted that the trial court charged that this statement was not admitted and must not be considered as evidence of guilt (R. 602-3, fols. 1805-6). Nevertheless the

prosecutor in summation referred to it as constituting su
evidence (732)—incidentally misquoting the testimo
(205).

Dated, September 28, 1951.

Respectfully submitted,

VINE H. SMITH
Attorney for Petitione

FRANK E. HOOK
OTHO S. BOWLING
Of Counsel

Office-Supreme Court,
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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM—1951

No. 188

GEORGE GILLETTE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

VINE H. SMITH,
Attorney for Petitioner.

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Supreme Court of the United States

OCTOBER TERM—1951

No. 188

GEORGE GILLETTE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

On October 8, 1951, this court, by its order dated on that day, denied the petition herein for certiorari. Pursuant to rule 33 of the rules of this court, the petitioner now applies for a rehearing of his petition for certiorari. Agreeably to the provisions of that rule, the considerations presented herein will be confined to grounds not previously presented and to intervening circumstances of substantial effect. In the latter category attention is called to the decision of the New York Court of Appeals of the State of New York rendered on October 18, 1951, *In the Matter of the Application of John M. Murtagh, Appellant,* etc. A copy of the opinion is annexed to this petition. The grounds which have been developed in the original petition, brief and reply brief, will not be restated except so far as is necessary to introduce the added reasons available to the petitioner for the issuance of the writ.

This application for rehearing will be further limited to the effect of the decision of the Court of Appeals in affirming the conviction under the eighth count of the indictment and will not involve the tenth count which charged conspiracy.

Decision of This Court

Petitioner's counsel interprets the decision of this court denying certiorari as a holding that the matters concerned are not of sufficient general consequence to merit review and determination by the court of last resort. To this element of the case, its importance and the need of such review and determination, the following points are principally addressed.

POINT I

The decision of the Court of Appeals should be reviewed by this Court because it involves an entirely novel interpretation of the Sixth Amendment of the Federal Constitution, in particular the provision thereof which confines jurisdiction in criminal cases to the district—or a district—in which "the crime" is committed.

The Court of Appeals expressly holds and the Solicitor General assumes and the proof shows that the crime charged in the indictment, the only crime defined by any United States statute, involved herein, that of interstate transportation of the spurious checks, was not committed in the Southern District of New York. The decision is, nevertheless, to the effect that that charge could be tried in the Southern District of New York because there is testimony that petitioner was present at a conference in the Southern District at which the transportation of some of the checks to Chicago was planned. Under this decision, if there had been a similar conference in the District of New Orleans, the substantive offense could have been prosecuted there and could have been tried under an indictment alleging the transportation in and from the District of Lou-

isiana in which New Orleans is located. It is submitted that such a decision is of sufficient importance to merit consideration, review and, if necessary, reversal or modification by this court.

If the idea underlying the decision is the (unexpressed) concept that preliminary conduct, such as counseling the offense, is a part of it, that view is, likewise, novel and opposed to the only decisions which we have found directly and specifically concerned with that view.

> *U. S.* v. *Lombardo,* 241 U. S. 74;
> *In the Matter of Murtagh,* New York Court of Appeals, Oct. 18, 1951.

The *Murtagh* case is so recent that the opinion has not as yet been reported, but petitioner's counsel has obtained a copy thereof and the entire opinion is annexed to this petition for re-hearing. A report of the decision has already been published in the New York Times for October 19th, on page 18, column 4, with quoted excerpts from the opinion, which was unanimous.

In each of these cases, the *Lombardo* decision of this court and the *Murtagh* decision of the New York Court of Appeals, the criminal offense was the omission to file a report. In each case, some other act had to be done before the obligation to file the report came into existence and in each case such other indispensable preliminary act was done in a place other than that in which the report had to be filed.

In the *Lombardo* case, the defendant in the Western District of the State of Washington had harbored an alien prostitute. He was required to file a report of such harboring in the Immigration Office at Washington, D. C.

In the *Murtagh* case, the accused, a public officer of the City of New York, had to make an investigation of certain

matters covering all five counties of the City of New York, of which one was the County of Kings. He was also required to file his report of that investigation in the office of the Mayor of the City, which was in New York County.

In each case the accused failed to file the report required. In the *Lombardo* case, the offender, because of that omission, was indicted in the Western District of the State of Washington. In the *Murtagh* case, the attempt was made to prosecute the investigating official in the County of Kings, one of the counties included in the City of New York. In each case the court of last resort held that the crime was committed at the place where the report should have been filed and that the attempt to prosecute in another jurisdictional unit was unauthorized and illegal.

It is submitted that the same principle and reasoning necessarily similarly define "the crime" under the provision of the Sixth Amendment, so that the trial of one accused of crime must be in the district where the crime is committed. In this case, the words "the crime" in that amendment must mean, as was held in the *Lombardo* and *Murtagh* cases, the offense itself, and that offense must be prosecuted in the district where it was committed, and cannot be prosecuted in other districts where acts have been done and words said which are related to—but not part of—the offense itself.

The view which would extend the jurisdiction permitted by the Sixth Amendment to include other districts in which the offense was planned or discussed is likewise opposed to the multitude of decisions distinguishing the substantive crime and the conspiracy to effect its commission as separate offenses.

Conversely, where by statute the counseling itself is the offense, the charge of committing it must be prosecuted and tried in the district where the counsel was given, and

cannot be tried in the district where the act urged was—or was to be—done.

Brothman v. *U. S.*, 191 F. (2nd) 70 (2nd Circ.).

In view of the effort to support the jurisdiction of the Southern District upon the accessory theory, attention is called to

People v. *Wallace*, 78 Cal. App. (2nd) 726, 747-8.

In that case the California Court dealt with a situation partly analogous to this one. In California, as in the Federal jurisdiction, there are no accessories before the fact and all abettors are principals. The Court applying statutory provisions closely similar to those governing the jurisdiction of federal courts, held that the objection of the defendant-appellant Wallace to the jurisdiction of the county in which the fraud charged had been attempted, rejected his claim that he could only be considered an accessory, and held that he was a principal and that the jurisdiction to try him for his participation had been properly assumed by the county where the attempt to consummate the larcenous fraud had been made. The language of the opinion clearly implies disapproval of the claim that he could for any purpose be regarded as an accessory before the fact.

POINT II

The decision of the Court of Appeals introduces an unauthorized, unworkable and confusing rule which is certain to complicate trials in analogous cases.

The Court of Appeals says that the trial judge was in error in not submitting to the jury the specific question as to the effect of the testimony as to what happened in the Southern District of New York. The evidence as to what happened there given by the co-defendant, and confessed forger, Larigan, was to the effect that the petitioner was present in a public restaurant where Turiano and various others discussed the plan to transport some of the spurious checks to Chicago. The only significant statement attributed to petitioner in the discussion was that he would not go to Chicago with the others, but that he wanted to come there later and "supervise." This statement elicited from Larigan after some prodding on direct examination he did not assert on cross-examination, but, on the contrary, repeatedly stated what he said was the entire participation of Gillette, the petitioner, in the conversation without again referring to this remark about supervision.

If the trial judge had submitted to the jury the issue in the form apparently contemplated by the Court of Appeals' opinion, he would have had to direct the jury first to determine how far Larigan's account of what happened in the restaurant was true, and, secondly, whether such participation as they found attributable to petitioner was sufficient to constitute him an accessory. He would have had to charge the jury, further, that the evidence as to the subsequent presence of petitioner in Chicago and in Los

Angeles could not, in itself, be considered evidence of a preconcert between him and the others but only as corroborative of Larigan's testimony as to what happened in the Southern District.

To put it concretely. If the jury found that at this meeting the petitioner had not decided to identify himself with the criminal enterprise, they could not have gone on to consider whether the subsequent events indicated that at some time (other than at the meeting in the restaurant) he had finally concluded to join the others.

The trial judge in the case at bar, of course, had no such filigree of distinction in mind. He believed that there was sufficient evidence to warrant submitting to the jury the charge as presented in the indictment.

Without further elaborating, it is obvious that the holding of the Court of Appeals provides a veritable witches' broth of complication and artificiality, for any judge conscientiously trying to follow the decisions of appellate courts.

It is submitted that this feature of the case also presents ground adequate to justify review by this Court.

POINT III

The holding that a jury's finding of fact that an offense not alleged in the indictment or submitted to the jury may be derived synthetically from the record is itself a violation of the defendant's constitutional right to trial by jury, and an error requiring correction by this Court before it starts spawning the mischief in the administration of justice with which it is manifestly pregnant.

We have already pointed out that, actually, the trial judge called the jury's attention to the fact that the testimony in the case presented both direct and circumstantial evidence and that he left to the jury to find whether the offense alleged in the indictment was committed, on the basis of this entire body of evidence. When, at petitioner's request, the judge charged that the only *direct* evidence as to certain matters was that given by Larigan respecting those matters, he did not alter his general charge that the jury was to reach its verdict on the basis of the entire body of evidence. When he called to their attention that the circumstantial proof might be considered as corroborative of Larigan's direct testimony, he did not alter his previous instruction that the circumstantial evidence itself was a basis for a finding on their part nor did he charge that Larigan's testimony must be believed in order to reach a verdict of conviction.

We are now assuming, however, that we are mistaken and the Solicitor General correct in this reading of the charge and that the jury not only might have but must have interpreted the instructions which they received so as to justify the appellate court's conclusion that they not

only found Larigan truthful but found that the occurrence in the Southern District of New York, which they found to be established by his testimony, showed, without more, the commission of accessorial acts in that District.

Even this large concession is insufficient to warrant the affirmance of the eighth count. The defendant had no opportunity to sum up to the jury on the issue as presented by the evidence of the half hour conference in the public restaurant in Manhattan taken by itself. The issue on which he was required to base his argument was the entire issue as set forth in the indictment and presented by all the evidence.

It is submitted that the point involved here is not one of form but of substance and is, in effect, that counsel for a defendant should be safe in discussing the issues presented by the indictment and submitted to the jury by the court, and should not be required—probably he would not be permitted—to undertake to foresee and to discuss the different issues which an appellate court might in the future assume to unravel, detach and decide.

In this connection it is to be noted that if this decision stands, the judgment as finally recorded in the district court will be to the effect that the petitioner transported spurious checks in and from the Southern District of New York to Chicago, Illinois—although the court has held that he did not.

Respectfully submitted,

VINE H. SMITH,
Attorney for Petitioner.

I certify that the foregoing petition for rehearing is presented in good faith and not for any purpose of delay and that in my opinion said petition is well founded in law.

VINE H. SMITH,
Attorney for Petitioner.

Opinion for Reversal

COURT OF APPEALS

STATE OF NEW YORK.

In the Matter

Of The

Application of JOHN M. MURTAGH, Appellant, for an Order, pursuant to Article 78 of the Civil Practice Act, directed to HON. SAMUEL S. LEIBOWITZ, individually and as a Judge of the County Court of Kings County, presiding as a Magistrate in the County of Kings, City and State of New York, Respondent.

DESMOND, *J.*:

The petition in this proceeding (brought under Article 78, C. P. A.), prayed for an order prohibiting respondent, individually and as a County Judge of Kings County presiding as a magistrate in that county, from continuing to assume jurisdiction over a criminal information filed with respondent against petitioner. Petitioner was, at the times mentioned in that information, a public officer of the City of New York, to wit: its Commissioner of Investigation. The lengthy information filed against appellant, charges the latter with committing, in Kings County, the misdemeanor of neglect of duty (Sections 1841 and 1857, Penal Law) in that it is alleged, he failed to file with the Mayor of the City of New York, as required by law (Section 803, New York City Charter, and New York City Administrative Code, sec. 803-1.0) a report of an investigation, which

the Mayor had ordered appellant to make, and which, according to the information, appellant did make. That investigation, it is stated in the information, was directed toward finding out whether New York City police officers had been lax or inefficient in enforcing the gambling laws, and whether they had taken bribes from gamblers. The information asserts that the investigation by appellant, on the Mayor's order, did disclose such corruption and failure to enforce the gambling laws throughout New York City, including Kings County, but that appellant made no report thereof to the Mayor.

Appellant, in this prohibition proceeding, takes the position that the information charges against him a crime which by its nature can be committed in New York County only, and not in Kings County. It is undisputed that the office of appellant as Commissioner of Investigation and the office of the Mayor are both located in New York County, and so, argues appellant, any report by the Commissioner to the Mayor was required to be made in New York County and any neglect of duty, such as the one alleged in this information, in failing to file such a report with the Mayor, could have occurred only in New York County. Appellant's further contention has to do with Section 134, Code of Criminal Procedure, which reads as follows:

> "When a crime is committed in one county and partly in another.
>
> "When a crime is committed, partly in one county and partly in another, or the acts or effects thereof, constituting, or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county."

Appellant says that the alleged crime described in this information is not one covered by Section 134, since it was not one which could be committed "partly in one county and partly in another," and since, as he argues, there were no acts or effects "constituting" or "requisite to the consummation of" this particular described offense, which were such as could be held to have occurred in two or more counties.

It seems clear to us that the failure of a City Commissioner to file a report with the Mayor, the offices of both officials being located in New York County, is a fault of omission which cannot be committed elsewhere than in New York County. It follows, therefore (and so the Appellate Division unanimously held), that, without recourse to Section 134, above quoted, there could not be any jurisdiction to deal with this information, in respondent, who is a County Judge elected in and for Kings County only, and qualified to sit as a committing magistrate in that county alone. The majority of the Appellate Division, however, was of the opinion that, within the meaning of section 134, *supra*, the prior act of making the investigation, in Kings County, was an "act requisite to the consummation" of the later offense of failing to file the report thereof in New York County, since, as the Appellate Division *Per Curiam* Opinion puts it: "there could have been no neglect of a duty to report unless the investigation had been made * * *". In effect, the court below, citing *People* v. *Mitchell*, 49 A. D. 531, affd. 168 N. Y. 604, and *People* v. *Hudson Valley Construction Co.*, 217 N. Y. 172, construed section 134, *supra*, to mean that if, in order to convict a defendant, the People must prove not only a criminal act committed in one county, but also an innocent act committed in another, the venue may be laid in either of the counties. We do not so construe or apply section 134.

It was the common law rule that every offense had to be inquired into, as well as tried, in the county where the offense was committed (see authorities collected in *People* v. *Hetenyi*, 277 A. D. 310, 314, affd. 301 N. Y. 757). So stringently was that rule applied, at common law, that where the alleged act was performed in part in one county and in part in another or others, venue was in neither county, and prosecution could not be had at all. To correct that weakness in the law, section 134 was passed in this state, as were its counterparts in other states. But that statute's coverage and purpose are plain from its heading: "*When a crime is committed partly in one county and partly in another.*" It is impossible, we think, to consider a failure to file a paper in a public office as an offense which can be broken up into parts. Under respondent's theory, a state official, ordered by the Governor to investigate certain conditions throughout the whole state, and, doing so but failing to report to the Governor the results of the inquiry, could be indicted in each of the State's sixty-two counties, as if his criminal failure to report had taken place in each of those counties. It seems to us that the crime of neglect of duty can be committed only where the duty is required to be performed, and that place, in this alleged instance, was New York County, the only place where appellant was in duty bound to file the report. We find no cases closely in point in this state or elsewhere, but conclude that such a failure to file is a single act of omission, and is not divisible into several parts.

We turn to respondent's contention that this situation is one of those described in Section 134, *supra*, "where the acts or effects * * * constituting, or requisite to the consummation of the offense, occur in two or more counties * * *". As we have noted, the claimed offense here is a single neglect of duty, consisting of one failure to file one report

with one superior officer. True, there would have been no neglect of that particular sort, had not there been an investigation, report of which appellant was required to make. But, according to the information, appellant did conduct and complete his investigation, so he is charged with no neglect of duty up to that point. His next, and separate, duty, and the one he is said to have neglected, was to make and file a report. His investigation preceded in time that alleged neglect of duty, but the subsequent fault, although *post,* was not *propter,* the early investigation, and so the investigation in Kings County was not an act constituting or requisite to the subsequent omission to report. Stating the same thing in another way, we hold that the lawful investigation was no part of the subsequent crime of neglect of duty, under sections 1841 and 1857, Penal Law.

We do not think either *People* v. *Mitchell, supra,* or *People* v. *Hudson Valley Construction Co., supra,* compels or suggests an affirmance here. Mitchell had been convicted in Erie County on proof that he had committed a larceny as defined in section 528 of the old Penal Code in that he, "having in his possession, custody or control, as a bailee" of property, had appropriated the same to his own use. The only question was to whether the indictment charged a crime committed within Erie County since it alleged that, in that county, he had become a bailee of personal property but had later taken it to Niagara County, and there had feloniously appropriated it. The appellate courts held that Erie County had jurisdiction. We think the distinction between that case and this is that, in the *Mitchell* case, the crime consisted not only of appropriating another's property to the defendant's own use, but of doing that with property which had been entrusted to defendant as bailee, in Erie County. Thus, a

bailment in Erie County was a component of the crime itself, made such by the Legislature, and not merely something which had, preliminarily, to be shown. That fact which had thus been made part of a crime although innocent in itself, had its situs in Erie County, and so Section 134, *supra,* applied. Furthermore as the Appellate Division's opinion in the *Mitchell* case points out (49 A. D. at page 535) the article bailed in Erie County should have been returned in that county.

People v. *Hudson Valley Construction Co., supra,* the other case relied on below, has to do with a crime which, not only in legal theory but in actual fact took place partly in Washington County, where the indictment was found, and partly in Albany County. The alleged offense was obtaining money from the State of New York through fraudulent misrepresentation to State officials of the cost of a State construction job. The indictment alleged the filing in Albany County of the false claims, but as to Washington County it alleged not only the doing of the construction work there, but also the formation in Washington County of a conspiracy to defraud the State, and the furnishing to State inspectors, in Washington County, of false vouchers. Thus, the crime in the *Hudson Valley* case was one made up of several separate fraudulent acts, some of which were done in Albany County and some in Washington County.

Respondent presents several other objections to the granting of a prohibition order here. He says that prohibition is a discretionary remedy and that it does not affirmatively and positively appear that it was here denied as matter of law, and so, as he sees it, we have no power to review what may have been an exercise of discretion. The Appellate Division's majority opinion, however, says that petitioner's application "was properly denied as a matter of law" and so we must conclude that no exercise

of discretion was the basis for its order. Moreover, the other opinion in the Appellate Division tells us that that court was unanimously of the opinion that prohibition should issue, if section 134, *supra,* is not applicable.

Next, respondent urges that prohibition lies only if a body or officer is about to act without or in excess of its or his jurisdiction and that there is, in this instance, power at least to hear and determine the issue of venue. Ordinarily, that would be true, but here it plainly appears that a Kings County Magistrate has assumed to deal with a crime which could not have been committed in Kings County at all. Total lack of jurisdiction is apparent. Finally, respondent says that this prohibition proceeding is premature, since appellant should have first submitted, to respondent, appellant's objection to respondent's taking jurisdiction. The answer to that is that since, on this information, respondent could never have jurisdiction to hold any hearing at all on this alleged crime, there is no reason why appellant should be compelled to submit himself to respondent for any hearing, or ask respondent to determine any issue therein.

The orders should be reversed without costs and the matter remitted to Special Term with instructions to grant the order of prohibition as prayed for in the petition.

* * * * *

Orders reversed, without costs, and the matter remitted to Special Term with instructions to grant the order of prohibition as prayed for in the position.

Opinion by Desmond, *J.* All concur.